

JAN 16 2009

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

23

and others. The well known term "material" is no more unclear than the MPEP class/subclass definition 426/89 which recites:

**MPEP class definition:**

89 SURFACE COATED, FLUID ENCAPSULATED, LAMINATED SOLID COMPOSITE OF SELF SUSTAINING DISSIMILAR EDIBLE MATERIAL

This subclass is indented under the class definition. Subject matter comprising a product (1) having a coating on the exterior thereof, (2) composed of a fluent **material** encased by another **material** or (3) composed of two or more solid self-sustaining materials integrally connected and wherein all of the above products are made up of distinct unlike edible **materials**.

The term "ingredient" is also a widely known prior art term used in commerce, in the writing of copious patent documents, and in every day life. As of this communication, a search for the term "material" renders 150,062 issued patents, "ingredient material" renders 295 issued patents, not to mention the multiple times the term may have been used in each issued patent, earlier patents, or patents earned outside the United States.

See United States Patents 4,822,627 (1989) to Clegg, et al. for Frozen confection suitable for deep frying, See patent 3,907,873 (1975) to Wight, et al., patent 3,946,995 (1976) to Anderson for Inter arc ingredient mixer, for such known terminology.

Ingredient materials: Raw materials put together to produce the composite (e.g., the metal alloy, metal powder, ceramic particles, etc.). During the processing the ingredient materials are transformed into the constituents of the MMC.

<http://mmc-assess.tuwien.ac.at/mmc/Article603.html>

See United States Patent 5,508,050 to Miki et al. (1996) which recites:

1. In a method for preparing a spring roll comprising the steps of placing an ingredient material on a dough sheet of the spring roll, rolling up the dough sheet to wrap said ingredient material, and frying the rolled spring roll, the improvement comprising: applying a food material consisting essentially of a main component selected from the group consisting of polysaccharides, powders of grains and mixtures thereof to 40% or more of the total surface area of the dough sheet of the spring roll before frying said spring roll.

Therefore, the terms, "ingredient," "material," and "ingredient material" were well known terms

JAN 16 2009

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

24

taught prior to the filing of applicant's invention, and may be used properly together without further teaching or confusion. There is no requirement for applicant to teach well known terms already used in commerce prior to applicant's filing.

Regarding claim 349: A support for a frozen comestible comprising a material comprising two edible ingredient materials. See template and context from specification below: See also figures 15A, 27A-27E. Discussion of figs. 1,2,5,6,11,12,15B-D,16B,16C,17,19,20-24,29-31 (current application) Applicant had responded numerous times to requests to show support in the specification for the claims, but has been ignored by examiner only to be asked anew each office action.

A boolean search for "material comprising material," renders 270 issued patents. The phrase is used quite often and is clear as written.

See: United States Patent 4,998,578 Dwivedi, et al. March 12, 1991

Method of making metal matrix composites

What is claimed is: 1. A method of producing a metal matrix composite, comprising: (a) forming a substantially impervious mold by the steps comprising: (i) providing a permeable preform having a cavity and comprised of a first filler material comprising a material selected from the group consisting of *alumina* and *silicon carbide*;

There is no requirement for an applicant to teach the meaning of a known prior art term(s) of commerce, as licensed to Lanxide Technology Company, LP (Newark, DE). Applicant's claims are clear as to what is encompassed by the terms. The terminology is proper, the claims particularly point out and distinctly claim the subject matter which the applicant regards as applicant's invention, and the claims have proper antecedent basis in the specification.

**Again Basis for claims:**

**Claim 349:**

A material  
comprising two ingredient materials

**Example in specification:**

candy  
hollow Twizzler, colored or flavored sugar (material comprising two ingredient materials)

**N.B. See MPEP § 2111.01.** < Applicant may use functional language, *alternative expressions*, negative limitations, or any style of expression or format of claim *which makes clear the boundaries of the subject matter for which protection is sought*.

**Original claim 6:**

support is a [composite] material,  
having a plurality of ingredients,  
wherein said support is a *candy bar, cookie bar, granola bar*.

See examples of: Material comprising two ingredient materials: below:

**Examples in specification:**

Three Musketeers by Mars (material)  
whipped chocolate nougat, thick chocolate coating (two ingredient materials)

Milky Way (material)  
whipped chocolate nougat, caramel (two ingredient materials)

Twix (material)  
dense cookie, caramel (two ingredient materials)

Butterfinger (material)  
ground roasted peanuts, thick chocolate coating

Snickers (material)  
peanuts, caramel (two ingredient materials)

100 Grand (material)  
caramel, crispy crunchies (rice) (two ingredient materials)

Baby Ruth (material)  
peanuts, caramel (two ingredient materials)

Charleston Chew (material)  
marshmallow, chocolate coating (two ingredient materials)

Nestle Bites (material)  
thick chocolate, fudge (two ingredient materials) or  
wafer, crème Kit Kat (two ingredient materials)

Fudge Shoppe Fudge Sticks (material)  
multi-layered wafered cookie ingredients i.e. wafer, crème (two ingredient materials)

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

26

Those skilled in the art of making materials and supports are well aware that a Milky Way Bar, or a Snickers Bar, etc. is a [confection] material comprising two ingredient materials. Also see USPTO class/subclass 426/89.

Other "materials" include Kudos, Riesen Candies, Caramello, Heath Bar, Mounds, Almond Joy "Limitations and examples in the specification do not generally limit what is covered by the claims." MPEP

N.B. The basis for the term "confectionary material" in the claims may be found at least in paragraphs [0233][0163] [0232] [0258] [0281] [0309] [0372] [0384] of the specification.

Regarding Claim 351: Examiner states claims are indefinite for the recitation of relative term "bite size material" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably appraised of the scope of the invention. The term "bite size ingredient" may have different meaning for different people.

In response, a search for the term "bite size" or "bite-size" of United States Patent and Trademark Office issued patents renders 250 issued patents. For example, patent 3,966,970 to Williams (1976) recites, " the cheese pieces are of bite size and the wrapping step ..." and "bite size lengths and pieces," i.e. without measurements, or definition. US Patent 4,547,143 (1985) to Cerreta for Bite Size Candy Molding Machine claims: "1. An apparatus for molding *bite size* pieces of candy comprising..." US patent D374,541 to Garza (1995) claims: "The ornamental design for a *bite size* snack food, as shown and described." Thus "bite size" is a known prior art term used in commerce, in the writing of copious patent documents, and used in every day life, clearly understood by one familiar in the art. There is no requirement that applicant teach the meaning of known and accepted terms, including the term "bite size."

Examiner has rejected claim 353 for being indefinite for being unclear as to what added limitation is being recited in claim 349. Examiner states that claim 353 depends from claim 349 and claim 353 restates the limitations of the independent claim 349, which are already part of claim 353. Thus, either claim 353 does not further limit claim 349, or applicant has chose to redefine a

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

27

known term.

In response, claim 353 has been amended to recite: The support for a frozen comestible of claim 349 wherein said material comprising two edible ingredient materials comprises a support. Applicant respectfully requests reconsideration and allowance of the claim.

Examiner has rejected claims **349-369** based on the recitation of "two combined ingredient materials" as it is unclear as to what is encompassed by said term. It is unclear whether the term "two combined ingredient materials" refers to two separate ingredients (such as, sugar and water) or the term refers to two combined ingredient materials (such as cereal and chocolate).

In response, the term "two combined ingredient materials" is not used in the pending claims. Applicant respectfully requests reconsideration and allowance of claims 349-369.

Examiner states the term "fun confection" or "fun composite material" in claims including 351 and 361 are relative terms which renders the claim indefinite. The terms are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree and one of ordinary skill in the art would not be reasonably appraised of the scope of the invention. The terms "fun confection" might have different meanings for different people, e.g. bubble gum might be a fun confection for one person, and a disturbance or not fun confection for the other.

In response, applicant has omitted the term "fun."

Examiner notes that claims including **362** are indefinite for the recitation of phrase "homogeneous material" as not being defined by applicant's disclosure. Thus the metes and bounds of the term are unclear.

The term homogenous material has been omitted from claim 362 of the above application.

Examiner states claims **340** are indefinite for the recitation of a "composite material." Examiner

has said applicant has not distinguished between the terms in the specification and thus the claim as recited unclear as to what is the scope of the term composite material. It is unclear whether the claim requires materials that can form a composite or materials that are composites themselves or some other.

In response, as above,

See **608.01(I) Original Claims** In establishing a disclosure, applicant may rely not only on the description and drawing as filed but also on the original claims if their content justifies it.

Applicant's *specification recites*: "composite support 62," "composite support 62A" "composite candy bar" [0196], [0197], [0199] (See page 18, above)

Applicant recites: "composite candy bar" support 62... Milky Way, Snickers..." This has been explained to Examiner many many times. Applicant has repeatedly told examiner of applicant's original claims 6, 19-23, reciting "a composite material," "composite support 62, 62A..." is fully enabled as a composite material support to one skilled in the art. Examiner is obligated to prosecute the claims in a manner consistent with the specification. (2111 Claim Interpretation) Examiner has not done so and has not shown due diligence.

One skilled in the art of making materials and supports may well be a mechanical engineer. A mechanical engineer knows that the term "composite" used properly, i.e. reasonably, refers to a material, and not to components glued together. One skilled in the art and especially "consistent with" applicant's specification is fully apprised of the fact that applicant's "composite support 62...", having seen the original claims 6, 19-23, the drawings, the term "composite candy bar," and prolific examples of composite material candy bars, such as the *Milky Way Bar*, *Snickers Bar*, *Baby Ruth* is an edible composite [material]. (Tuwien IDS) One skilled in the art of making materials knows that a composite [material] is used to make a component. One skilled in the art of making materials knows that the edible assemblies of Musher (ice pop) and Feybusch (cone) is clearly not evidence of a composite [material]. (See gingerbread house, below)

A Boolean search for "composite material" on the USPTO shows 37,067 issued patents. Thus the terms "composite" and "composite material" were well known terms widely used prior to

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

29

Applicant. There is no requirement that patent applicant teach the meanings of every day widely used known terms, including the term "composite material."

Claim one of United States Patent 6,815,066 to Elliott (November 9, 2004) recites:

1. A composite comprising tungsten, tin and a polyfluorinated hydrocarbon.

Since the USPTO issued patent to Elliott recites only "a composite" to reflect a composite material comprising tungsten, tin and a polyfluorinated hydrocarbon, one skilled in the art of making materials need not be appraised of any further explanation or any "specific definitions" of the term. "Composite" is well known enough to stand alone in the patent of Elliott, and is therefore well known enough to stand alone in the application above, as a material.

In addition, the term "composite material" is a well known term of commerce used in thousands of issued patents. There is no requirement for an applicant to teach the meaning, construction of, or method of a well known prior term actively used in commerce since at least since 1912:

Pearson's will be celebrating 90 years of St. Paul candy-making next month, and the popularity of its salty Nut Rolls, bodacious Nut Goodies, and signature Mint Patties shows no sign of abating.

*"The first "composite" chocolate bar--featuring marshmallow, caramel, peanuts, and milk chocolate--was the Goo-Goo Cluster, which debuted just a few months before the Nut Goodie in 1912."*

See: <http://www.citypages.com/1998-12-23/restaurants/the-ghost-of-candy-bars-past>  
December 1998 (composite chocolate bar, i.e composite material chocolate bar "

#### Reference.com Background

The most primitive composite materials comprised straw and mud in the form of bricks for building construction; the Biblical book of Exodus speaks of the Israelites being oppressed by Pharaoh, by being forced to make bricks without straw being provided. The ancient brick-making process can still be seen on Egyptian tomb paintings in the Metropolitan Museum of Art

Examiner's argument that applicant's terminology "composite material." is "unclear," and the "subject matter is unclear and thus it renders the claims indefinite," "...unclear as to what is encompassed by said terms," lacks merit, and has lacked merit, and impeded prosecution for eight

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

30

years (especially when the claims as originally filed recited "a composite material.")

### **Regarding Means Claims**

Examiner states that claim 368 and 369 are indefinite for the recitation of A support for a frozen comestible comprising two edible ingredient materials and means for making a support for a frozen comestible.

Applicant had already remedied claim 368 to recite "A support for a frozen comestible comprising two edible ingredient materials and means for making *said* support." Applicant's claim is now proper and Applicant respectfully requests reconsideration and allowance of the claim. Applicant is not required to specify means, apparatus, or equipment employed in a means claim. Claim 369 has been canceled.

### **Double Patenting**

Examiner required the election/restriction of the above application.

### **Applicant's Claim 349 Recites Novel Features and So Distinguishes Over Musher Under Section 102**

#### **One Skilled in the Art Knows That An Edible Assembly is NOT Evidence of A Composite Material**

All of the claims clearly recite novel features and are patentably distinguishable from the prior art over Musher and Feybusch under section 102.

Claims 349-369 are said to be rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700). The last Office Action rejected all of the claims on Musher and Feybusch under section 102. Applicant requests reconsideration of this rejection since the claims recite novel and unobvious subject matter over each of these references.

Examiner states that Musher teaches ice cream (frozen comestible) on an edible support structure



Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

31

or a composite support which has **at least two** edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e. two combined ingredient materials (Page 1: column 1, lines 37-46 and column 2 lines 40-45) also (page 4; column 1, line 72 to column 2, line 23), *as instantly claimed*.

Applicant's claim 349 recites: A support for a frozen comestible comprising a material comprising two edible ingredient materials. Claim 360 recites: A support for a frozen comestible comprising an edible composite material.

**N.B. Finality of the Next Action Is Precluded** Although the Summary of the past Office Actions indicates that claims 349-369 stand rejected, *the Detailed Actions omit any explanation of how any cited art anticipates these claims*. Applicant respectfully submits that this omission amounts to a failure to articulate a prima facie case of unpatentability and *the burden to rebut this "rejection" has not yet shifted to the Applicant*. Consequently, a next Office Action rejecting claims 349-383 cannot properly be made final since only then would the Applicant be obligated to rebut the rejection, presuming that such an Office action sets forth a prima facie case. (See MPEP § 706.07(a)).

**Those Skilled in the Art Know that an Edible Assembly is Not Evidence  
Of the Well Known Composite [Material]**

Examiner broadly states that since Musher teaches of at least two discernable (i.e. perceptible) edible materials or components or members that are combined together to make Musher's support, ("composite support"), and therefore applicant's claims are anticipated. If it were sufficient to say: "The support or cone taught by Feybusch (1927) comprises of two ingredient materials, i.e., cone making pastry material (such as sugar flour etc) and edible adhesive material, such as molasses, and popcorn or nuts or brittle or puffed rice, "composite support," "*as instantly claimed*," then the patent to Musher (1939) would not exist, since it too is a support comprising two ingredient materials that are combined to make the support, (as are many products), yet the patent and Trademark Office has issued such a patent to Musher. (See patent

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

32

of Musher (1939) in view of Feybusch (1926).) Therefore, this argument is moot.

Examiner relies upon, "a composite support which has at least two edible discernable (i.e. perceptible) edible materials or components or members that are combined together to make the support, i.e., two combined ingredient materials." This does not address the merits of applicant's claims.

Examiner has yet to address, or present a line of reasoning why applicant's claims: A support for a frozen comestible comprising a material comprising two edible ingredient materials, or a support for a frozen comestible comprising a composite material has been anticipated. Every element of a claim must be anticipated. Examiner has not shown evidence of applicant's claims in the cited art.

Musher teaches of an edible assembly. Those skilled in the art of making edible supports know that an edible assembly is not factual evidence of the presence of a composite material, or a material comprising two ingredient materials. Those skilled in the art also know that a baked stick is not a composite material. Those skilled in the art also know that a homogenous candy (pg. 11 of oa) is not evidence of a composite material. Those skilled in the art also know that the combination of Musher's framework and the stick is not evidence of a composite material. One can make an airplane of hundreds, or thousands of parts and NEVER use a composite material. The teachings of the edible assembly of Musher do not touch the merits of applicant's invention, and examiner's argument thus far is therefore moot. There is no teaching by Musher that he has invented a composite material. Applicant respectfully submits that the Office has, by only repeating mere conclusory statements, has failed to satisfy its burden to articulate a prima facie case under 35 USC 102(b).

[A prima facie case of anticipation requires, within the four corners of a single reference, or with reference to the interpretation of a single reference in light of the interpretation of one of ordinary skill in the art (a hypothetical person having the requisite education and experience to work in the field of the invention, having possession of all of the knowledge within the prior art, but without the exercise of inventive skill), a showing of each claim element as set forth in the claim.]

There is no requirement for applicant to define the known term, "a composite material," since products, such as composite material candy bars, have been used in commerce for nearly one

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

33

hundred years. (See Goo Goo Clusters 1912, below) and (myriad of issued patents). Examiner has also admitted that Musher has at least two discernable materials, or components, or members (pg. 13, Para. 2) but has not said which one comprises two ingredient materials, or which material comprises a composite material. Attaching discernable components together to make *an edible assembly*, as relied upon by examiner, do not address applicant's claims, as written, and is moot. This omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to Applicant. (See MPEP § 706.07(a)). Examiner has yet to make any legal grounds for rejection, or show factual evidence. Accordingly, the finality of the next action is precluded. The cited art is not enabling in that it does not have or teach the manner of how to make and use applicant's invention, as required for anticipation.

Furthermore, Applicant's claims 349, 360 and all claims clearly distinguish over the support of Musher, as Musher does not at least show: a) a non frozen support. This is an important element that Musher does not have. Musher teaches that his invention is a frozen confection. Despite the assertions of Examiner, there is no factual evidence that Musher has supplied a non frozen support for a consumer. See: FROZEN CONFECTION AND METHOD FOR MAKING IT (title, abstract, specification, all embodiments, all claims). Since the support is part of the all frozen confection, it too is frozen. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Musher does not show at least a non frozen support. Thus, the non frozen support of applicant has NOT been anticipated by Musher.

Moreover, Applicant's claim 349 further clearly distinguishes over the support of Musher, since Musher also does not show at least: b) a non frozen material comprising two non frozen edible ingredient materials. ALL of Musher's materials are frozen. Applicant's invention has novel physical structure and is patentable over the reference to Musher, which is also unobvious. As well as other reasons, having a non frozen support allows the user to supply one's own chosen flavor of added frozen comestible to the support at ones own home, which the support of Musher cannot do. Applicant's non frozen material comprising two non frozen ingredient materials has not

Appn. Number 09/641,410 (Kiely)

GAU 1794

Amendment A

34

been anticipated by Musher.

In the past Office Action examiner has rejected the claims asserting that the "the formed and coated support of Musher is non-frozen prior to addition of liquid and freezing steps. Thus the composite support for a frozen confection as taught by Musher is not frozen until the ice cream material is poured into the voids and the entire structure is frozen."

In response, it is noted that Examiner has thus admitted, that the support of Musher *is frozen* upon completion of the invention. ("...until the ice cream material is poured into the voids and the entire structure is frozen.") Examiner may not dissect Musher's invention and use an incomplete invention to reject Applicant's claims. This is unjustified and unlawful. This method would undermine countless issued patents. Examiner, as well, may not ignore the teachings of the invention as a whole, i.e. a frozen confection. To be anticipated, an invention as a whole must be fully considered. Musher's invention shows a frozen confection. Applicant's invention, above, is a non-frozen invention comprising a non frozen material that comprises two non frozen ingredient materials. Musher's invention is an edible assembly which does not show evidence of a composite material. Musher has not disclosed every element of applicant's claim(s). Therefore, Musher has NOT anticipated Applicant's claims, since to be anticipated, "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Thus far examiner has not shown any factual evidence of non-patentability, as required. This omission amounts to a failure to articulate a prima facie case of unpatentability and the burden to rebut this "rejection" has not yet shifted to Applicant. (See MPEP § 706.07(a); and 2106 Patent Subject Matter Eligibility [R-6] USPTO personnel may not dissect a claimed invention into discrete elements and then evaluate the elements in isolation. Instead, the claim as a whole must be considered.)

### **Musher Teaches Away From a Composite Material**

A composite, or composite material, is known by those skilled in the art of making materials to have a solid material. Therefore, Musher, in addition to not anticipating applicant's claims for at

least the reasons above, also does not show a composite material, as his framework cannot comprise a solid material and his stick and fat each show only one ingredient material, i.e. baked stick, chocolate. Musher teaches away from using a composite material. (See Britannica below). The material that makes Musher's framework must be an edible lacy or lattice material with many "interstices" to hold ice cream within it. (page 2, col. 2, lls. 28-32) (page 3, col. 1, lls. 75 - col 2, lls. 1 -13) (*all drawing figures, all embodiments*). "provide as much space as possible for the predominant, base material..." (Pg. 4, col 1, lls. 26-43). Musher's framework *can never* be a solid material.

Britannica online encyclopedia article on composite material: construction - *also called composite: a solid material* that results when two or more different substances, each with its own characteristics, are combined to create a new substance whose properties are *superior* to those of the original components in a specific application. *The term composite more specifically refers to a structural material*, (such as plastic) within which a fibrous material (such a silicone carbide) is embedded.

#### **Definition of the word Bar**

1. a relatively long, evenly shaped piece of some solid substance, as metal or wood, used as a guard or obstruction or for some mechanical purpose: the bars of a cage.
2. an oblong piece of any solid material: a bar of soap; **a candy bar**.

See also class definition 426/89, above for solid material.

If Musher's unit framework were a solid material, ice cream could not flow into it for the purpose of Musher's invention, i.e. supporting the ice cream within the framework, and would be inoperative. A solid material does not work for Musher. There would be no voids for the ice cream to flow into if the material were solid. Musher teaches directly away from using a composite material in his support. Musher's baked stick is a single ingredient material, baked stick, one ingredient material, not two, and does not comprise a composite material. Musher's inventive step did not include the use of a composite material. The combination of the framework with the baked stick, as well, is not a composite material, since at least the unit framework is at right angles to the baked stick, i.e. is not a solid material, does not have a common interface, and are separate materials anyway, which is not disputed.

Appn. Number 09/641,410 (Kiely)GAU 1794Amendment A36

Regarding applicant's dependent claims, Musher also does not teach of an ingredient in a support that comprises a material comprising two ingredient materials, as all of Musher's ingredients are raw ingredients, not ingredient materials. He does not teach of a support comprising two ingredient materials.